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# In the Supreme Court of the United States

OCTOBER TERM, 1990

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

STATE OF OKLAHOMA, ET AL.

STATE OF ARKANSAS, ET. AL., PETITIONER

v.

STATE OF OKLAHOMA, ET AL.

ON WRITS OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

## BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY

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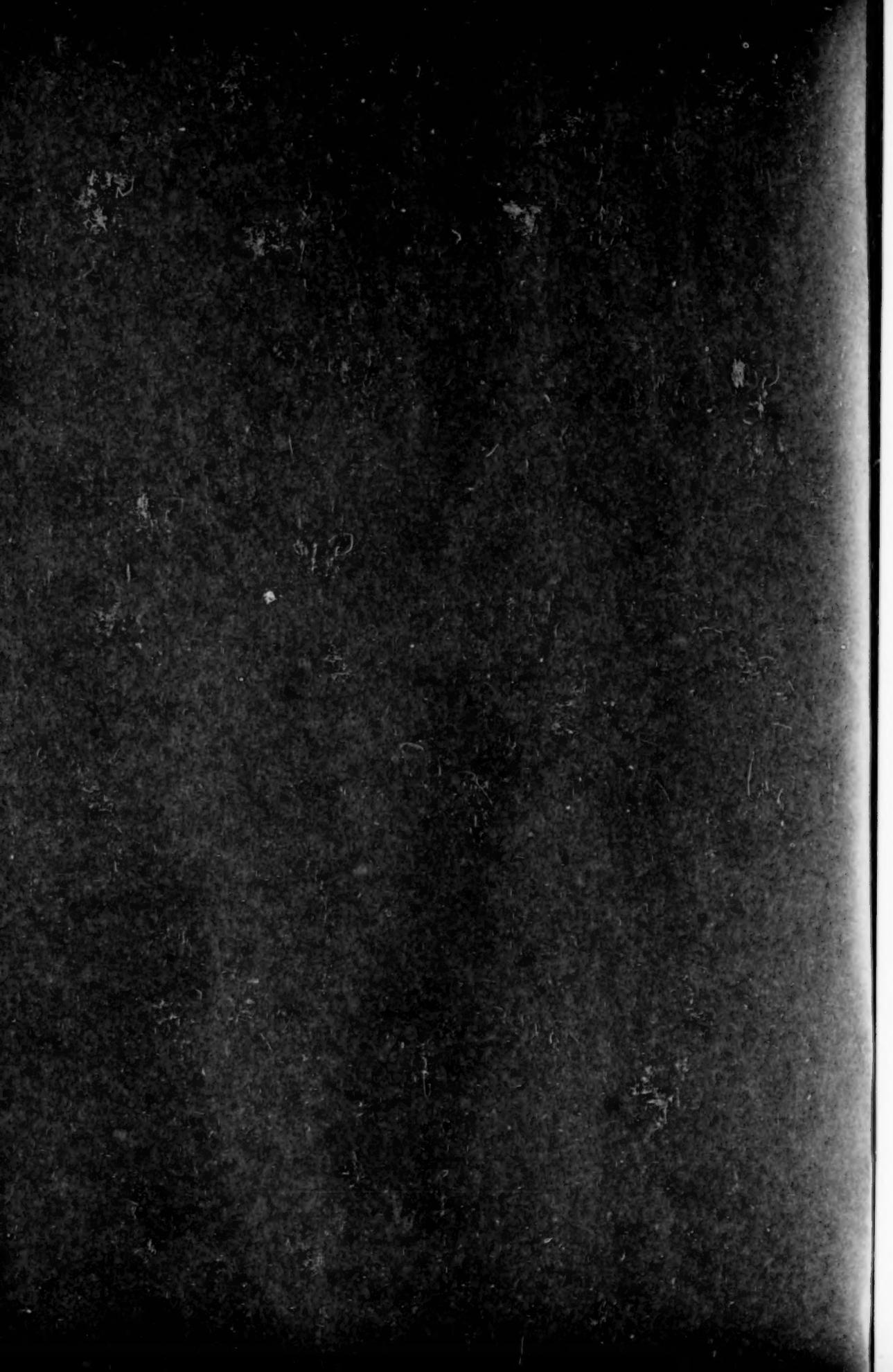
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### **QUESTIONS PRESENTED**

1. Whether determination of the appropriate standards governing the issuance of permits under the Clean Water Act for discharges into interstate waters involves a question of federal law, requiring a reviewing court to uphold the validity of the Environmental Protection Agency's permitting action if that action was based upon a reasonable interpretation and application of the federally approved water quality standards of the receiving State.
2. Whether the Environmental Protection Agency reasonably concluded that the contemplated discharge would comply with the applicable water quality standards because it would have no detectable impact on current water quality within the receiving State.
3. Whether the court exceeded the proper scope of judicial review.

(1)

### **PARTIES TO THE PROCEEDINGS**

The parties to the proceedings in the court of appeals, in addition to the United States Environmental Protection Agency, were the State of Arkansas, The Arkansas Department of Pollution Control and Ecology, The City of Fayetteville, Arkansas, the Beaver Water District, the State of Oklahoma, the Oklahoma Scenic Rivers Commission, The Oklahoma Pollution Control Coordinating Board, Save the Illinois River (STIR), and the Oklahoma Wildlife Federation.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1990

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No. 90-1266

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

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No. 90-1262

STATE OF ARKANSAS, ET. AL., PETITIONER

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**OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1a-97a)<sup>1</sup> is reported at 908 F.2d 595.

**JURISDICTION**

The judgment of the court of appeals was entered on July 11, 1990. Petitions for rehearing were denied on October 11, 1990 (Pet. App. 98a-99a). On December 29, 1990, Justice White extended the time for filing a petition for a

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<sup>1</sup> "Pet. App." refers to the petition appendix in No. 90-1266; "Ark. Pet. App." refers to the petition appendix in No. 90-1262.

writ of certiorari to and including February 8, 1991. The petitions were filed on that date, and granted on April 1, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(l).

#### **STATUTORY AND REGULATORY PROVISIONS INVOLVED**

The relevant provisions of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, are reproduced at Pet. App. 100a-106a. The relevant provisions of the Oklahoma Water Quality Standards are reproduced at Pet. App. 96a-97a.

#### **STATEMENT**

1. The Clean Water Act, 33 U.S.C. 1251 *et seq.*, is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through reduction and eventual elimination of the discharge of pollutants into those waters. Section 101(a), 33 U.S.C. 1251(a). The Act anticipates a partnership between the federal government and the States to achieve this fundamental goal. The Administrator of the Environmental Protection Agency (EPA) is, with certain explicit exceptions not relevant here, responsible for administering the Act. Section 101(d), 33 U.S.C. 1251(d). A major responsibility of the Administrator under the Act is the development and promulgation of uniform national technology-based standards, known as "effluent limitations guidelines," for categories and classes of discharges. Sections 301 and 304, 33 U.S.C. 1311 and 1314. *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 126-136 (1977). An "effluent limitation" is "a[ ] restriction \* \* \* on quantities, rates, and concentrations of chemical, physical, biological, and other

constituents which are discharged from point sources." Section 502(11), 33 U.S.C. 1362(11).<sup>2</sup>

A second major source of authority for reducing pollution is found in Section 303, which directs States, with federal approval and oversight, to institute a range of comprehensive requirements, potentially more stringent than the federally imposed limitations, to assure protection of the quality of all state waters. Section 303(a), (b), and (c)(1), 33 U.S.C. 1313(a), (b), and (c)(1). These water quality standards are not technology-based standards; instead, they are based on the desired uses and condition of the particular waterway involved. Congress utilized water quality standards "as a supplementary basis \* \* \* so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n.12 (1976). Section 303(c)(2), 33 U.S.C. 1313(c)(2). A water quality standard is a method of expressing the desired condition of a waterway. Water quality standards under the Act generally consist of three elements: (1) one or more designated "uses" of that waterway (e.g., public water supply, recreation, propagation of fish, or agriculture) consistent with the goals of the Act as set forth in Section 101; (2) "criteria" specifying the amount of various pollutants that may be present in those waters and still protect the designated uses, expressed in numerical concentration limits or narrative form; and (3) a provision restricting the degradation of certain waters, i.e., an antidegradation policy. Section 303(c)(2), 33 U.S.C. 1313(c)(2); Section

<sup>2</sup> A point source is "any discernible, confined and discrete conveyance \* \* \* from which pollutants are or may be discharged." Section 502(14), 33 U.S.C. 1362(14).

303(d)(4)(B), 33 U.S.C. 1313(d)(4)(B); 40 C.F.R. Pt. 131, Subpt. B. The States must submit their water quality standards to EPA for review and approval. Upon approval by EPA, a state-adopted water quality standard "shall thereafter be the water quality standard for the applicable water of that State." Section 303(c)(3), 33 U.S.C. 1313(c)(3).

The primary means for achieving and enforcing effluent limitations guidelines and state water quality requirements is the "national pollutant discharge elimination system" (NPDES) permit program under Section 402 of the Act, 33 U.S.C. 1342. *State Water Resources Control Bd.*, 426 U.S. at 205. The Act prohibits the discharge of any pollutant<sup>3</sup> into the waters of the United States except when authorized by an NPDES permit or a Section 404 permit.<sup>4</sup> Section 301(a), 33 U.S.C. 1311(a). Thus, an NPDES permit (which may include a timetable for compliance) transforms generally applicable effluent limitations guidelines and state water quality standards into obligations of the individual discharger. See 40 C.F.R. 122.44(d)(1).

The Act provides that EPA will issue NPDES permits except in those States where EPA has approved a state permit program pursuant to Section 402(b), 33 U.S.C. 1342(b).<sup>5</sup> Even in those States with approved permit programs, the State must submit to EPA a copy of each proposed permit involving an interstate waterway before it may be issued.

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<sup>3</sup> The term "pollutant" is defined in Section 502(6) of the Act, 33 U.S.C. 1362(6).

<sup>4</sup> Section 404 permits authorize the discharge of "dredged or fill material," whereas NPDES permits authorize the discharge of all other pollutants. Section 404(a), 33 U.S.C. 1344(a). The permit at issue here is an NPDES permit.

<sup>5</sup> EPA had permit-issuing authority in this case, which involves discharges arising in Arkansas, because Arkansas did not have an approved permit program at the time the permit application was made. EPA has subsequently approved the Arkansas permit program.

Section 402(d)(1) and (2), 33 U.S.C. 1342(d)(1) and (2); 40 C.F.R. 123.24(d). EPA may object to issuance of an NPDES permit if it determines that issuance would be "outside the guidelines and requirements" of the Act. Section 402(d)(2)(B), 33 U.S.C. 1342(d)(2)(B). On receipt of an objection, the State may submit an appropriately revised permit; if it fails to do so, EPA will issue a permit "in accordance with the guidelines and requirements" of the Act. Section 402(d)(4), 33 U.S.C. 1342(d)(4).

The Clean Water Act also establishes mechanisms for resolving interstate water pollution questions, *i.e.*, situations where a discharge in one State may affect the waters of another State. Specifically, the statutory conditions for EPA approval of state permit programs require each program to contain specified provisions for dealing with such situations. The source, or permit-issuing, State must have procedures for notifying other States, "the waters of which may be affected," of a permit application contemplating such discharges. Section 402(b)(3), 33 U.S.C. 1342(b)(3). Each potentially affected State must then be afforded an opportunity to "submit written recommendations to the permitting State" and to EPA regarding the application. Section 402(b)(5), 33 U.S.C. 1342(b)(5). If any part of those recommendations is not accepted by the permitting State, that State must notify the affected State and EPA. Section 402(b)(5), 33 U.S.C. 1342(b)(5). EPA then has the right to object to issuance of the permit, as provided in Section 402(d)(2)(A), 33 U.S.C. 1342(d)(2)(A).

Where EPA itself retains permit-issuing authority, the statutory procedures for resolution of interstate disputes are contained in the provisions governing the issuance of federal licenses and permits that may affect water quality. Thus, Section 401(a), 33 U.S.C. 1341(a), requires applicants for federal licenses or permits for activities that may result in discharges to navigable waters to provide a certification

from the source State that the proposed discharge will comply, *inter alia*, with applicable water quality standards. If the source State denies such a certification, no permit may be issued. Section 401(a), 33 U.S.C. 1341(a). Whenever EPA (or any other federal permitting authority) determines that a discharge might affect water quality in another State, it must notify that State. Section 401(a)(2), 33 U.S.C. 1341(a)(2). If the notified State determines that the discharge will violate its water quality requirements, the federal permitting authority must (if the State requests) hold a hearing to consider the State's objections and EPA's recommendations, and "condition such \* \* \* permit in such manner as may be necessary to insure compliance with applicable water quality requirements." Section 401(a), 33 U.S.C. 1341(a)(2).<sup>6</sup>

2. This case involves an interstate dispute concerning the waters of the Illinois River, which originates in the State of Arkansas and flows into the State of Oklahoma.<sup>7</sup> In the early 1980's the City of Fayetteville, Arkansas, operated a sewage treatment plant that discharged all of its wastewater into the White River (which is not a tributary of the Illinois River).<sup>8</sup> The White River was unable to assimilate that waste without violating Arkansas' water quality standards. To alleviate this situation, Fayetteville constructed a new wastewater treatment plant, with federal financial assistance provided by EPA under the Clean Water Act. The plant

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<sup>6</sup> If EPA is itself the permitting agency, the hearing is held pursuant to the provisions of Section 402(a), 33 U.S.C. 1342(a).

<sup>7</sup> In 1970, Oklahoma designated the portion of the Illinois River from the state line to the Tenkiller Reservoir a state scenic river. Pet. App. 50a, 62a; Okla. Stat. Ann. tit. 82, § 1452(b)(1) (West 1990).

<sup>8</sup> The sewage treatment plants of other Arkansas communities have, however, historically discharged their effluent into the Illinois River above the state line. See Ark. Pet. App. 128a.

was designed so that its discharges into the White River would not cause a violation of Arkansas water quality standards: discharged pollutants were to be greatly reduced, and half of the treated effluent was to be discharged into a tributary of the Illinois River. Pet. App. 2a, 5a.<sup>9</sup>

In 1985, Fayetteville applied to EPA for an NPDES permit for its new treatment plant. Following public notice and an informal public hearing (see 40 C.F.R. Pt. 124), EPA issued an NPDES permit to Fayetteville on November 5, 1985, to become effective on December 10, 1985. The permit authorized split flow into both the White River and the Illinois River tributary; it contained stringent limits with respect to oxygen demand, total suspended solids, and phosphorus. It also prohibited discharge of inadequately treated sewage, so that if the plant malfunctioned, wastewater would have to be stored and retreated. Finally, a reopen provision in the permit specified that if an ongoing study of water quality in the Illinois River showed a need for more stringent limitations on Fayetteville's discharge to ensure compliance with Oklahoma water quality standards, the permit would be modified accordingly. Pet. App. 5a-6a.

Both Oklahoma and Arkansas requested an evidentiary hearing before EPA on its issuance of the NPDES permit. The sole issue addressed in the evidentiary hearing was whether the Fayetteville discharge into the tributary of the

<sup>9</sup> Fayetteville's plans prompted the State of Oklahoma to move this Court for leave to file an original action against the State of Arkansas (and other entities) alleging causes of action under the federal and state common law of nuisance. *Oklahoma v. Arkansas*, No. 93 Orig. In response to the Court's invitation, the United States filed a brief opposing the motion for leave to file the complaint, on the ground that the Clean Water Act permitting procedures would afford the State an adequate remedy for any threat to its water quality standards. This Court denied the motion for leave to file the complaint. 460 U.S. 1020 (1983).

Illinois River would cause a violation of the Oklahoma water quality standards (Oklahoma standards). Ark. Pet. App. 98a. The evidence at the hearing consisted largely of expert testimony discussing various mathematical models designed to predict the impact of the proposed flow on the waters of the Illinois River in Oklahoma. *Id.* at 99a. Reliance on this type of evidence was necessary not only because no actual effluent measurements were available (since the Fayetteville plant was not yet in operation), but also because the effluent was to be discharged at the Fayetteville plant, 39 miles upstream from the Oklahoma state line. It was therefore necessary to predict the changes the effluent would undergo while it was still in Arkansas—e.g., changes resulting from the assimilation of nutrients by biota in the river, and from reoxygenation through aeration and turbulence. See Ark. Pet. App. 99a, 129a, 139a.

The relevant Oklahoma standards include numeric dissolved oxygen requirements, limitations on the concentrations of nutrients (phosphorous and nitrogen/phosphorous concentration ratio), and numeric limitations on inorganic elements and organic chemicals. Ark. Pet. App. 127a, 136a-137a, 140a-142a. In addition, the Oklahoma standards include beneficial use and antidegradation provisions. The beneficial use provision prohibits “any new point source discharge of wastes [into protected rivers] \* \* \* except under conditions described in Section 3.” Oklahoma standard § 5, Pet. App. 96a. Section 3, Oklahoma’s antidegradation provision, in turn provides that “[n]o further water quality degradation which would interfere with or become injurious to existing instream water uses shall be allowed.” Pet. App. 96a. Recognizing that certain high quality waters currently exceed their beneficial use standards, Section 3 also provides that “[n]o degradation shall be allowed in high quality waters.” *Id.* at 97a. High quality

waters include designated state scenic rivers such as the Illinois River above the Tenkiller Reservoir.

The EPA's Administrative Law Judge upheld the permit, finding that the discharge into the Illinois River would not violate the Oklahoma standards, including the state anti-degradation provision, because the discharge would not have an "undue impact" on Illinois River water quality in Oklahoma. Ark. Pet. App. 95a-107a. On Oklahoma's appeal, EPA's Chief Judicial Officer (acting pursuant to a delegation of authority under 40 C.F.R. 124.72(b), see Ark. Pet. App. 145a n.4) found that the ALJ had applied the wrong standard: while compliance with the Oklahoma standards was required, such compliance was to be judged by whether there would be a "detectable" or "measurable" violation of water quality standards at the boundary. *Id.* at 115a-121a.

On remand, the ALJ ruled that the proposed discharge would have no "detectable" impact on the Oklahoma portion of the Illinois River and thus upheld the permit. Ark. Pet. App. 122a-144a. Specifically, the ALJ found that the phosphorous added to the Illinois River by the Fayetteville discharge would largely be assimilated before the river reached the Oklahoma border (*id.* at 129a).<sup>10</sup> Because this small increase in phosphorous would not result in an in-

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<sup>10</sup> The ALJ calculated that if the Fayetteville plant released the maximum permissible daily effluent of 3.5 million gallons, 6 pounds of phosphorous per day would reach the Oklahoma state line. Ark. Pet. App. 129a. Other Arkansas entities currently discharge approximately 750 pounds of phosphorous per day into the Illinois river, but new treatment plants under construction at three Arkansas cities will permit "large phosphorus reductions" in their effluent – resulting in an estimated 54% reduction of total phosphorus loading to the Illinois River basin. Ark. Pet. App. 128a, 132a.

crease in eutrophication of waters in Oklahoma (*ibid.*),<sup>11</sup> the ALJ ruled that the Fayetteville discharge would not cause a violation of the Oklahoma standards for nutrients. Ark. Pet. App. 132a. The ALJ also found that the Fayetteville effluent would achieve complete oxygen recovery before the river reached the Oklahoma border; therefore there was no violation of the Oklahoma standards for dissolved oxygen. *Id.* at 140a. Finally, the ALJ found that there would be no discernible violation of aesthetic standards (*id.* at 134a) or of the numeric criteria as to metals or organic chemicals. *Id.* at 143a. In sum, the ALJ concluded that the proposed discharge would not cause a violation of any of the Oklahoma water quality standards.

Oklahoma filed an administrative appeal, and, in an order issued on December 22, 1988, the Chief Judicial Officer declined further review. Ark. Pet. App. 145a-153a. In that order, the Chief Judicial Officer again stated that the governing interpretation of the antidegradation provision is that “[f]or a [water] quality degradation to exist, there must be a degradation caused by a change in some water quality parameter such as nutrients, metals, dissolved oxygen, etc. In his Decision on Remand, the ALJ concluded that the Fayetteville discharge would not cause a detectable change in any of these parameters.” *Id.* at 152a. The Chief Judicial Officer upheld that conclusion (*id.* at 153a), and thus the

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<sup>11</sup> The ALJ explained (Ark. Pet. App. 127a, quoting Oklahoma standard § 7.10(b)) that eutrophication is:

the normally slow aging process by which a lake evolves into a bog or marsh and ultimately assumes a terrestrial state. During eutrophication the lake becomes so rich in nutritive compounds (especially nitrogen and phosphorus) that algae and other microscopic plant life become superabundant, thereby “chocking” the lake, and causing the lake to advance in serial stages.

permit went into effect. Operations pursuant thereto commenced on January 21, 1989.<sup>12</sup>

3. Three petitions for review were filed in early 1989. The Arkansas petition challenged EPA's authority to require that an Arkansas discharger comply with Oklahoma water quality standards. Petitions by the Oklahoma parties and by an environmental group, Save The Illinois River (STIR), alleged violations of Oklahoma water quality standards resulting from EPA's grant of the NPDES permit. Arkansas' petition for review, which was initially filed in the Eighth Circuit, was transferred to the Tenth Circuit and consolidated with those of the Oklahoma parties and STIR.

On July 11, 1990, the Tenth Circuit issued its opinion in this matter. Pet. App. 1a-97a. Rejecting Arkansas' challenge, the court first determined that EPA had properly interpreted the Act to require it to consider, in the NPDES permit procedure, whether a proposed discharge would violate the federally approved water quality standards of a downstream State. *Id.* at 14a-48a. The court proceeded, however, to reverse EPA's decision to issue the permit. The court rejected EPA's conclusion that the antidegradation provisions of the Oklahoma water quality standards are satisfied so long as the Fayetteville discharge does not result in any detectable change to any water quality parameter at

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<sup>12</sup> In the course of the administrative proceedings, several rulings were made to which Arkansas objected; Arkansas thereupon moved this Court for leave to file an original action against Oklahoma concerning the application of Oklahoma's water quality standards to an Arkansas permittee. *Arkansas v. Oklahoma*, No. 115 Orig. The United States filed a brief as amicus curiae, arguing that Arkansas was attempting to bypass the established administrative procedures for resolving this interstate dispute. The State's remedy, the brief argued, was to let the permitting process run its course and to seek judicial review under the Clean Water Act if it was displeased with the result. The Court denied leave to file an original action. 488 U.S. 1000 (1989).

the Oklahoma state line. Finding that EPA “incorrectly construed and applied [the] Oklahoma regulations” (*id.* at 60a, 83a-84a), the court adopted a novel interpretation of the antidegradation provisions of the Oklahoma standards not advanced by any party. *Id.* at 48a. The court’s approach was this: In light of its view of the federal policies embodied in the Clean Water Act and EPA regulations,<sup>13</sup> the court read the Oklahoma antidegradation provisions as prohibiting *any* further release of pollutants that will reach an “already degraded” river.<sup>14</sup> The court summarized its view of the relevant provisions (*id.* at 90a-91a):

[I]f a body of water is experiencing [water quality standard] violations and a proposed new source would discharge the same pollutants to which those standards apply, that source may not be permitted if its effluent will reach the degraded waters.

Analyzing the record before EPA, the court concluded that there was “ample evidence from which the ALJ could have concluded” (Pet. App. 63a) that the Illinois River in Oklahoma was already degraded (*id.* at 62a-73a),<sup>15</sup> and that

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<sup>13</sup> See, e.g., Pet. App. 85a-90a (discussing Clean Water Act policy and legislative history), 54a (court’s examination of state policy is “guided by the minimum requirements \* \* \* set forth in EPA’s regulation”), 85a (EPA’s position inconsistent with “federal water pollution control strategy engineered by the Clean Water Act and enhanced by Oklahoma law”), 90a (“We will not ascribe to the [Clean Water] Act either the gaping loophole or the irrational purpose necessary to uphold EPA’s action.”), 94a (EPA “decision is inconsistent with the language of the Clean Water Act, as interpreted in light of the legislative history, and frustrates the policy that Congress sought to implement”).

<sup>14</sup> The court used 1970, the date of Oklahoma’s designation of the relevant portion of the Illinois River as a “scenic river” (see note 7, *supra*), as the benchmark from which to determine whether water quality had been degraded. Pet. App. 62a.

<sup>15</sup> Because the parties had not considered the historic water quality of the Illinois River significant to the propriety of the issuance of the

pollutants from the Fayetteville discharge would reach the Oklahoma boundary (*id.* at 73a-76a) and would contribute to the existing degradation of the river at that point (*id.* at 76a-82a).<sup>16</sup> The court expressly “reject[ed] any notion that once water quality standards have been violated (i.e., the quality of the receiving waters has been degraded), the incremental impact of a proposed additional discharge must itself be detectable.” *Id.* at 90a. Instead, the court was of the view that it was necessary to deny the permit because “[a]t worst, [permitting the proposed discharges] will increase the frequency and severity of ongoing violations; at best, it will thwart efforts to bring the river back into compliance with the applicable standards.” *Id.* at 91a.

In sum, the court concluded that “EPA’s failure to exercise its authority to deny the Fayetteville permit is arbitrary and capricious or otherwise not in accordance with law.” *Id.* at 94a. The court flatly held that Fayetteville discharges “may not be permitted” (*id.* at 61a) and that, accordingly, “the Fayetteville permit may not issue.” *Id.* at 83a n.49. Instead of remanding to EPA for reconsideration of the permit decision under the judicially prescribed standards, the court of appeals simply “reverse[d] EPA’s decision authorizing Fayetteville’s municipal treatment plant to discharge a portion of its effluent to the Illinois River basin.” *Id.* at 95a.<sup>17</sup>

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permit, the court’s factual findings on this aspect of the case constitute gleanings from “a record that consists of five boxes and four years of briefs, orders, transcripts, prepared testimony, correspondence, technical reports, and miscellaneous other documents” (Pet. App. 62a) on a matter that had not been addressed in the EPA proceedings, nor briefed and argued by the parties. See *id.* at 61a n.40.

<sup>16</sup> The court was not deterred by its recognition that this latter issue involves “more a scientific question than it is a legal one.” Pet. App. 76a.

<sup>17</sup> On October 31, 1990, the court granted Arkansas’ motion to stay the issuance of the mandate pending this Court’s action on petitions for certiorari; accordingly, the discharges from the Fayetteville plant are continuing.

**SUMMARY OF ARGUMENT**

Federal—not state—law governs the complex issues raised in disputes involving interstate water pollution. In the Clean Water Act, Congress has entrusted to EPA the primary responsibility for resolving such federal issues that arise in the context of its consideration of applications for NPDES permits. Before issuing a permit authorizing discharges into an interstate waterway, EPA must determine that the proposed permit will meet all applicable requirements of the Act and implementing regulations, including compliance with federally approved water quality standards of the receiving State. But in any interstate dispute involving the application of a receiving State's water quality standards, the statutory scheme provides that EPA—not the receiving State—is to determine the proper application of the standards. Accordingly, the validity of EPA's decision to issue the Fayetteville permit depends on whether the Agency reasonably interpreted and applied applicable Oklahoma water quality standards, not on whether issuance of the permit is consistent with the reviewing court's own interpretation of those standards as a question of the law of the receiving State *simpliciter*.

In this case, EPA reasonably concluded that the Oklahoma antidegradation standard permits a discharge that will have no detectable impact on the current condition of Oklahoma's protected waters. The court of appeals, however, preferred a policy that would prohibit any discharge that would theoretically reach waters that were already degraded. Under well-established principles of administrative law, this preference was an impermissible basis for rejecting EPA's contrary interpretation. To make matters worse, the court's interpretation would create serious practical difficulties in implementing water quality requirements for interstate waterways. The court of appeals'

error was compounded by the fact that the court based its decision on issues not raised or briefed by the parties; engaged in independent fact-finding that disregarded the scientific expertise of the Agency; and declined to remand the permit decision to the Agency. In short, the court of appeals not only ignored the special role given EPA under the Clean Water Act but transgressed basic principles of administrative law which require reviewing courts to give appropriate deference to the administrative process.

#### **ARGUMENT**

##### **I. FEDERAL LAW GOVERNS THE INTERPRETATION AND APPLICATION OF FEDERALLY APPROVED STATE WATER QUALITY STANDARDS TO OUT-OF-STATE DISCHARGES**

The court of appeals fundamentally misconstrued the teachings of the Court and the effect of the Clean Water Act in the context of an interstate dispute. Instead of interpreting the requirements of the Clean Water Act in this context as a matter of federal law, the court of appeals treated the question of how the Oklahoma water quality standards (specifically, the beneficial use and antidegradation provisions) should be interpreted in this case as entirely a question of state law.<sup>18</sup> It then undertook to construe the provisions on its own without first examining the reasonableness of EPA's interpretation of the federally-approved standard. Pet. App. at 53a-54a.

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<sup>18</sup> For instance, the court noted that “[t]he Oklahoma courts apparently have not interpreted these provisions” and in a footnote concluded that an opinion of the Oklahoma Attorney General discussing the provisions seemed contrary to the language of the provisions themselves. Pet. App. 53a.

A. This Court's Decisions Establish That Interstate Water Pollution Issues Are To Be Resolved By Application Of Federal Law

This Court's decisions make clear that when interstate water pollution issues are involved, the interpretation of the Clean Water Act's requirements is a matter of federal, not state, law. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 102 (1972) (*Milwaukee I*); *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987). Furthermore, the Court has recognized that the 1972 Amendments to the Federal Water Pollution Control Act (now the Clean Water Act) "establish an all-encompassing program of water pollution regulation" (*City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981) (*Milwaukee II*)), under which "[f]ederal courts lack authority to impose more stringent effluent limitations \*\*\* than those imposed by the agency charged by Congress with administering this comprehensive scheme" under the guise of applying federal common law. *Id.* at 320.<sup>19</sup> And in *Ouellette*, the Court specifically concluded that "the CWA precludes a court from applying the [common] law of an affected State against an out-of-state source." 479 U.S. at 494. Instead, "the Act limits the right to administer the permit system to the EPA and the source States." *Id.* at 495. It follows from this Court's precedents that the question of the proper standards to be applied to the Fayetteville discharges under the Clean Water Act ultimately involves a question of federal law.

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<sup>19</sup> In explaining why courts should not invoke federal common law to supplement the comprehensive statutory scheme, the Court noted (451 U.S. at 325): "[n]ot only are the technical problems difficult — doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise — but the general area is particularly unsuited to the [case-by-case] approach inevitable under a regime of federal common law." These same considerations, of course, counsel reliance on the expert agency's interpretation and application of the relevant federal requirements.

**B. The Clean Water Act Assigns To EPA The Responsibility For Resolution Of Disputes Between States Over The Discharge Of Pollutants Into Interstate Waters**

The Clean Water Act directs EPA to address interstate water pollution issues in either of two ways, depending upon whether the source State or EPA is the permit-issuing authority. If the source State's program has been approved by EPA under Section 402(b), 33 U.S.C. 1342(b), the State may issue the permit, unless EPA objects pursuant to Section 402(d)(2), 33 U.S.C. 1342(d)(2).<sup>20</sup> Where, as here, EPA is the permit-issuing authority, EPA is directly responsible for determining whether a proposed permit will meet all applicable requirements of the Act and implementing regulations (Section 402(a)). Although the federal permitting authority may not issue a permit if the source State determines that the permit will not comply with its water quality standards, the federal permitting authority need only consider the "recommendations" of a receiving State in determining whether the permit will comply with that State's standards. Section 401(a)(1) and (2), 33 U.S.C. 1341(a)(1) and (2). As this Court explained in *Ouellette*, 479 U.S. at 491, "the Act makes it clear that affected States occupy a subordinate position to source States in the federal regulatory program." Thus, the text of the Clean Water Act commits the determination of whether the permit will

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<sup>20</sup> That provision sets forth two grounds for an objection. See *Champion Int'l Corp. v. EPA*, 850 F.2d 182, 185 (4th Cir. 1988). Under Section 402(d)(2)(A), EPA may object when there is an unresolved interstate dispute that has been brought to EPA's attention under the procedures in Section 402(b)(5)(providing for notification to EPA of a receiving State's objections to the issuance of the permit, and of the permitting State's action with regard to those objections). Under Section 402(d)(2)(B), EPA may—even in the absence of a state complaint—object to the issuance of any permit "as being outside the guidelines and requirements" of the Act.

achieve compliance with the receiving State's water quality standards to the federal permitting agency:<sup>21</sup>

Such agency \* \* \* shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements.

33 U.S.C. 1341(a)(2). In determining compliance, the agency necessarily has to make decisions concerning the proper interpretation of the receiving State's water quality standards and how those standards apply to an out-of-state discharger.<sup>22</sup>

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<sup>21</sup> The permitting authority's responsibility under federal law to determine whether the issuance of the permit will comply with the downstream State's standards suggests a fully sufficient alternative basis for affirming the EPA decision to issue a permit in this case. The threshold question of the showing necessary to determine under the CWA whether there is compliance with any particular state standard is itself a matter of federal, not state, law. Therefore, EPA's decision that "the permit should be upheld if the record shows by a preponderance of the evidence that the authorized discharges would not cause an actual *detectable* violation of Oklahoma's water quality standards" (Ark. Pet. App. 117a) represents an EPA interpretation of the *federal* statute's requirement for compliance in the context of this case, rather than an interpretation of any Oklahoma standard at all. Under this alternative analysis, the "detectability" requirement simply represents an intensely practical conclusion that, as a matter of federal law, the threshold question of whether an issue of compliance with the receiving State's standards is even presented is definitively answered in the negative where the effect of the proposed discharge cannot be detected at the critical point — the receiving State's boundary. *Id.* at 118a n. 16.

<sup>22</sup> The Arkansas petition correctly recognizes that, in determining whether to issue a permit for a discharge into interstate waters, EPA has authority "to assess compliance with downstream standards." Ark. Pet. 13. But Arkansas also appears to suggest that EPA is free to ignore the receiving State's standards altogether, or to balance the respective interests of the States through which an interstate waterway passes. *Id.* at 13-16. EPA has never asserted such authority, in this or any other

As a result, in any interstate dispute involving the application of a downstream State's water quality standards, the statutory scheme provides that EPA – not the downstream State – is to determine the proper application of the standards, either in reviewing the permits for possible objection under Section 402(d) or in its role as permit issuer. This federal responsibility complements EPA's responsibility under the Act to review and approve proposed state water quality standards. Section 303(c), 33 U.S.C. 1313(c). Before granting approval, EPA must determine that the proposed standard "meets the requirements" of the Act. Section 303(c)(3), 33 U.S.C. 1313(c)(3).<sup>23</sup> In determining whether a proposed standard meets the statutory requirements, it is, of course, necessary for EPA to determine the meaning of that standard. Therefore, if a dispute concerning the meaning of the standard subsequently arises in the context of a permitting decision,<sup>24</sup> EPA's interpretation of the

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case, and the terms of the NPDES permit issued by EPA to Fayetteville would not have been affected if EPA had agreed with Arkansas' interpretation. It is therefore unnecessary for this Court to consider whether the Act gives EPA the authority claimed for it by Arkansas.

<sup>23</sup> If EPA cannot make that finding, it must allow the State to make the changes necessary to bring the standards into conformity with the Act. If the State fails to do so in a timely manner, EPA will promulgate the water quality standards for the State. Section 303(c)(3) and (4), 33 U.S.C. 1313(c)(3) and (4).

Arkansas suggests (90-1262 Pet. 14) that EPA has no authority to disapprove a state water quality standard on the ground that it has a discriminatory impact on out-of-state dischargers. EPA has never disapproved a state standard on the ground that it has such a "predatory" effect, and accordingly has not considered the extent of its power to do so, or, if such power exists, the criteria to be applied to identify a predatory standard. Because there was no such disapproval of the Oklahoma standards in this case, the Court need not address that issue here.

<sup>24</sup> Since many water quality standards are, like the Oklahoma antidegradation provision at issue here, in narrative form and thus

disputed provision, which presumably reflects its understanding of that provision when approval was granted, should normally be dispositive.<sup>25</sup>

### C. EPA's Interpretation Of The Federally-Approved Oklahoma Standards Is Entitled To Judicial Deference

In light of the key role assigned by the Clean Water Act to EPA as arbiter of interstate water pollution disputes under the Act and EPA's responsibility for approving state-submitted water quality standards, EPA's interpretation of the water quality standards involved in this case should, under established principles of administrative law, be accorded deference. It is beyond dispute that a reviewing court should defer to an agency's reasonable interpretation of a regulation it is charged with administering. *Ford Motor Credit Co. v. Milholland*, 444 U.S. 555, 566 (1980); *United States v. Larionoff*, 431 U.S. 864, 872-873 (1977); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Navistar Int'l Transp. Corp. v. EPA*, 858 F.2d 282, 288 (6th Cir. 1988), cert. denied, 490 U.S. 1039 (1989) (EPA's interpretation of a federally approved state air quality standard is accorded the same deference by a reviewing court as EPA's interpreta-

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necessarily expressed in rather general terms, disagreements as to their meaning will often surface only when the standards are applied in the context of a specific permit proceeding – as happened here.

<sup>25</sup> To guide the States in the promulgation of water quality standards, EPA regulations set out (at 40 C.F.R. Pt. 131) model water quality standards satisfying the requirements of Section 303 of the Clean Water Act, 33 U.S.C. 1313. Where, as here, the water quality standard adopted by the State is based on the EPA model (see note 27, *infra*), and there is no clear indication at the time the proposed standard was submitted to EPA for approval that the State intended a different meaning, it is surely reasonable and appropriate for EPA to construe the state standard as being consistent with the model provision.

tion of its own regulations). Cf. *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984). Accordingly, to the extent that the terms of a federally approved state standard are ambiguous or silent on a particular point at issue in an interstate dispute, EPA's interpretation of the standard should be followed "unless it is plainly erroneous or inconsistent with the regulation." *United States v. Larionoff*, 431 U.S. at 872 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

In short, the question is not whether EPA interpreted the water quality standards applicable to the Oklahoma portion of the Illinois River in the same way they would be interpreted by the reviewing court or even by Oklahoma itself (see, e.g., Pet. App. 60a). Instead, the question, in reviewing the validity of EPA's administrative action, is whether EPA's reading and application of those standards in the permitting proceeding was reasonable.

The court of appeals failed to address this issue. Instead, it candidly admitted that it was substituting its own interpretation for that of EPA (Pet. App. 48a-49a, 54a-55a), adopted a restrictive construction of the applicable standards not advanced by any party (*id.* at 48a), and rejected EPA's construction out of hand. *Id.* at 53a-57a.<sup>26</sup>

## **II. THERE WAS NO APPROPRIATE BASIS FOR REJECTING EPA'S INTERPRETATION AND APPLICATION OF THE OKLAHOMA STANDARDS**

Before issuing the permit to Fayetteville to discharge effluent into a tributary of the Illinois River, EPA as the per-

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<sup>26</sup> Thus, the court stated without elaboration that the "ALJ's interpretation defies the plain language of the Beneficial Use Limitations and the Anti-Degradation Policy that it references." Pet. App. 57a. The court ignored the fact that the governing interpretation was set forth in the Chief Judicial Officer's opinion of June 28, 1988 (Ark. Pet. App. 117a) and was reaffirmed in his order of December 22, 1988, denying review. *Id.* at 152a-153a.

mitting agency had to determine whether the permit conditions would assure compliance with the Oklahoma Water Quality Standards applicable to that river in Oklahoma. In particular, EPA had to interpret Oklahoma standard § 3, which provides that “[n]o degradation shall be allowed in high quality waters,” including the portion of the Illinois River between the Oklahoma boundary and Tenkiller Reservoir. EPA concluded that Oklahoma standard § 3 permits a discharge upstream from protected waters so long as that discharge will have no detectable impact on current water quality in the protected waters. The court of appeals rejected both the “no-detectable impact” and the “current condition” aspects of EPA’s interpretation of Oklahoma standard § 3 as inconsistent with its plain meaning (Pet. App. 53a). The court ruled that the antidegradation requirement prohibited the issuance of any permit for a new discharge in Arkansas – whether or not that discharge would have any detectable impact on water quality parameters in Oklahoma – if the water quality in the waterway in Oklahoma has been degraded compared to an historical benchmark (here, 1970, when the River was designated a “scenic river”). *Id.* at 62a, 90a. In so concluding, the court improperly rejected EPA’s reasonable interpretation of the federally approved anti-degradation standard.

**A. EPA Reasonably Construed The State Antidegradation Provision To Allow An Out-Of-State Discharge Where That Discharge Would Have No Detectable Impact On The Current Water Quality Of The Protected Waters**

In its operative provisions, Oklahoma Water Quality Standard § 3, which was adopted in 1982 (Pet. App. 50a n. 29), is a verbatim replication of the federal antidegra-

tion standard that was then in effect.<sup>27</sup> Accordingly, in considering the Fayetteville NPDES permit application, EPA interpreted the Oklahoma standard as identical to the federal one.

While a similar antidegradation standard may be adopted by any State,<sup>28</sup> there has been no national rulemaking or determination on how to interpret and apply the terms of the standard.<sup>29</sup> Questions can therefore arise as to what constitutes a "degradation" of water quality, and as to the benchmark from which degradation is to be measured.

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<sup>27</sup> Even the court of appeals noted the similarities between the state provision and EPA's model provision (Pet. App. 54a n.34). Compare the antidegradation provision of Oklahoma standard § 3:

No degradation shall be allowed in high quality waters which constitute an outstanding resource or in waters of exceptional recreational or ecological significance.

with the corresponding language in EPA's model antidegradation regulations in effect until 1983 (40 C.F.R. 35.1550(e)(2) (1981)):

Additionally, no degradation shall be allowed in high quality waters which constitute an outstanding National resource, such as waters \* \* \* of exceptional recreational or ecological significance.

The current regulations provide that high quality waters "shall be maintained and protected" (40 C.F.R. 131.12(a)(3)). This change was to allow for temporary degradation associated with construction projects. The change did not affect the restrictions for long-term sources of pollutants. 48 Fed. Reg. 51,402-51,403 (1983).

<sup>28</sup> The antidegradation requirements of the federal model water quality standards were created by administrative action. The antidegradation policy was first enunciated by Secretary Udall of the Interior Department in 1968. The instant antidegradation standard was adopted by EPA in 1975. Congress subsequently referred to the antidegradation policy in the 1987 Amendments to the Clean Water Act. See 33 U.S.C. 1313(d)(4)(B).

<sup>29</sup> This standard is termed a Tier III antidegradation standard, and the waters protected by it are known as "outstanding national resource waters," or ONRW.

1. There is general agreement that the "no degradation of water quality" requirement means that a new discharge should not result in a lowering of water quality in an ONRW,<sup>30</sup> but EPA has not attempted to prescribe general standards for determining what constitutes a "lowering" of water quality. Instead, the individual decisionmaker, i.e., the State or EPA, must determine on a case-by-case basis whether addition of pollutants to a water body will result in a lowering of water quality.<sup>31</sup>

In this interstate case, EPA's determination of what constitutes degradation, or a lowering of water quality, was set forth in the Chief Judicial Officer's initial decision of June 28, 1988 (Ark. Pet. App. 117a):

[A] mere theoretical impairment of Oklahoma's water quality standards—*i.e.*, an infinitesimal impairment predicted through modeling but not expected to be actually detectable or measurable—should not by itself block the issuance of the permit. In this case, the permit should be upheld if the record shows by a preponderance of the evidence that the authorized discharges would not cause an actual *detectable* violation of Oklahoma's water quality standards.

The Chief Judicial Officer's order of December 22, 1988, clarified the application of this interpretation to the State's antidegradation policy. The CJO explained that because the

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<sup>30</sup> See, e.g., Region IV, Questions and Answers on Implementation of Tier III of the Federal Antidegradation Policy: Protection of Outstanding National Resource Waters (Apr. 20, 1989), which states that there should be no new discharge of pollutants directly into an ONRW; discharges to tributaries are permissible if they do not lower water quality at the boundary of the ONRW.

<sup>31</sup> See, e.g., Region V, Guidance for Antidegradation Policy Implementation for High Quality Waters (Dec. 3, 1986); Region IX, Guidance on Implementing the Antidegradation Provisions of 40 C.F.R. 131.12 (June 3, 1987).

antidegradation policy for waters subject to the highest degree of protection is in fact a "policy," not a numeric standard, it would be violated if there were any water quality degradation in such waters. But "[f]or a quality degradation to exist, there must be a degradation caused by a change in some water quality parameter such as nutrients, metals, dissolved oxygen, etc." Ark. Pet. App. 152a. In other words, if a discharge "will not cause a detectable change in any of the relevant water quality parameters, it logically follows that there will not be a 'quality degradation.'" *Id.* at 152a-153a. Thus, EPA interpreted the antidegradation policy as permitting a discharge upstream from protected waters so long as that discharge will have no detectable impact on water quality parameters in the protected waters.<sup>32</sup>

This interpretation of the antidegradation provision was entirely reasonable and consistent with the language of the Oklahoma standard, the federal regulation on which it was based, and the policies and purposes of the Clean Water Act. At least where the effects of a discharge are undetectable at the State boundary, the receiving State can have little more than a theoretical basis for concluding that its water has been degraded. In such circumstances, it is at least reasonable for EPA to conclude that the discharge is not prohibited.

2. Determining whether a new discharge will degrade downstream water quality requires identification of the water quality level to be protected. The parties to this case, and the EPA decisionmakers, considered the relevant water

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<sup>32</sup> Indeed, Oklahoma took essentially the same position in briefing before EPA. It there stated, "any *detectible* [sic] increase in any 'wastes', defined as 'any industrial waste and all other liquid, gaseous or solid substances which may pollute or tend to pollute any waters of the State,' will be a violation of the [scenic river] designation" (emphasis added). A.R. Doc. B146, at 45.

quality to be that in existence at the Oklahoma border at the time the permit was under consideration. Again, this was a reasonable interpretation and application of the anti-degradation provisions of Oklahoma standard § 3. That provision states only that “[n]o degradation shall be allowed in high quality waters”; it does not provide a description of the water quality to be maintained. Nothing in the Oklahoma standards provides a general benchmark date, nor is there in the standards any suggestion that there is a particular benchmark date for the Illinois River. In these circumstances, EPA’s reliance on current water quality at the boundary as the applicable benchmark was entirely reasonable.<sup>13</sup>

The court found that the “plain language” of the Oklahoma beneficial use and antidegradation provisions showed that they prohibit discharges of pollutants into a scenic river if “its water quality *has been degraded* or if the new source *would degrade* it.” Pet. App. 53a-54a. But the court did not identify the specific regulatory language upon which it relied, and in fact no language in the Oklahoma standards indicates an intent to consider whether water quality “*has been degraded*” from the standard it had at some point in the past.

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<sup>13</sup> States must affirmatively designate water bodies to be outstanding national resource waters protected from degradation under Tier III standards. Modern designations often do contain a reference date or a description of the water quality to be maintained. The application of such an antidegradation provision could, of course, raise issues not relevant to this case. In any event, a State is highly unlikely to adopt as a benchmark date a time substantially antedating the application of the protective standard to the waterway involved. Compare Okla. Stat. Ann. tit. 82 § 1452(b)(1) (West 1990) (designation as scenic river) with *id.* § 1457 (authorization to impose pollution controls on scenic rivers).

### B. The Court of Appeals' Policy Choices Are Not Required By The Clean Water Act or Applicable Regulations

The court of appeals' reading of the EPA-approved state antidegradation provision was based primarily on two conclusions: (1) that "degradation" must be measured from some historic benchmark date, undefined in the provision itself, rather than from the current condition of the waterway, and (2) that if current water quality is adjudged poorer than it was at that prior time, no further upstream discharges may be permitted. Taken together, these conclusions establish a "zero-discharge" requirement once the waters in question fall below the historic benchmark.<sup>34</sup> Moreover, that requirement extends beyond a receiving State's borders to preclude any discharges in all upstream tributaries of the interstate waterway. But the conclusions reflected in the zero-discharge requirement represent policy choices not required by the Clean Water Act, EPA's regulations, or the federally approved Oklahoma standards. The court's adoption of those conclusions certainly does not suggest that EPA's decision in this case, which reflected alternative permissible policy choices, was in any way unreasonable.<sup>35</sup> Thus, the court had no authority to impose a zero-discharge requirement.<sup>36</sup>

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<sup>34</sup> It is not entirely clear whether the court intended this requirement to apply only to "high quality waters" subject to an antidegradation policy similar to Oklahoma's, or whether it was intended—as Arkansas assumes (Ark. Pet. 20-23)—to apply to any application for a permit to discharge into waters upstream from waters not presently in compliance with any applicable standard.

<sup>35</sup> Moreover, if the court's zero-discharge requirement was intended to apply to water quality standards generally (see note 34, *supra*), the court ignored EPA's regulation specifically addressing the circumstances under which a discharge may be allowed into waters that do not currently meet the applicable standards. 40 C.F.R. 122.4(i).

<sup>36</sup> As this Court explained in discussing judicial interpretations of

The practical difficulties occasioned by such judicial intrusion into EPA's responsibilities are vividly illustrated by this case. The ruling of the court of appeals—that *no* discharge may be permitted upstream if the pollutants in the effluent would reach a degraded downstream waterway—would create serious problems of implementation.<sup>37</sup> It may be nigh unto impossible to demonstrate that pollutants in an upstream discharge will *never* reach a point downstream. While modelling or other available predictive techniques may persuasively demonstrate that pollutants are *unlikely* to survive in the water system, so that only a *de minimis* amount would reach protected waters, it may be statistically impossible to show that *no* amount of pollutant will ever pass into those waters. The court's zero-discharge standard does not consider whether there is an

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the requirements of the Clean Air Act in *Chevron*, 467 U.S. at 865:

Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments.

<sup>37</sup> Moreover, the court of appeals' analysis leaves no room for considering whether a discharge will actually dilute, and thereby improve, the ambient concentration of pollutants in the affected stream. For most pollutants, the effect of a discharge on ambient water quality is a function of the relative concentration of the stream and the discharge. If the discharge has a lower concentration of pollutants than the stream, it will dilute, and thereby improve, the stream. Thus, logically even where a stream is in violation of a numerical water quality standard, a high volume discharge containing the pollutant of concern may nonetheless not only not exacerbate the violation, but it may even mitigate or cure that violation, if the concentration of the pollutant in the discharge is low enough.

exception for *de minimis* amounts of pollutants.<sup>38</sup> If there is to be such an exception, it must be defined; under the court's ruling, the standard must be somewhere below the level of detectability, which poses obvious problems for enforcement. If there is to be no exception for *de minimis* amounts of pollutants, then the consequences of a state designation of high quality waters to be subject to the suggested federal antidegradation policy are substantially different from those anticipated by EPA (and, most likely, the States that have adopted EPA's model standards).

More generally, the Agency's responsibility for approving state standards would be gravely undermined if its reasonable interpretations of those standards could be jettisoned on judicial review. This is of fundamental practical importance, because EPA's ability to perform effectively its statutory role in resolving interstate disputes over the issuance of NPDES permits requires the Agency to rely on its own reasonable construction of a state standard. Indeed, if reviewing courts may substitute their own interpretations of an EPA-approved state standard, then similarly worded standards of various States may well have different meanings in different circuits, or even within the same circuit. The resulting uncertainty and confusion—especially in lengthy river systems involving several receiving States—would lead to precisely the situation that Congress sought to avoid by enacting the comprehensive Clean Water Act

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<sup>38</sup> Compare Ark. Pet. App. 128a-132a (Al J's findings that maximum permissible daily effluent from the Fayetteville plant would result in increase of six pounds of phosphorus per day at Oklahoma boundary, although other Arkansas entities currently discharge 750 pounds of phosphorus per day into Illinois River in Arkansas) with Pet. App. 73a-76a (court determination that sufficient phosphorus will reach the Illinois line from the Fayetteville plant to violate antidegradation standard). See note 10, *supra*.

Amendments to replace the former case-by-case approach of the federal common law. See *Milwaukee II*, 451 U.S. at 324-325.

### **III. THE COURT OF APPEALS SHOULD HAVE CONSIDERED WHETHER THE RECORD SUPPORTED ISSUANCE OF THE PERMIT UNDER THE INTERPRETATION OF THE OKLAHOMA STANDARDS ADOPTED BY EPA**

Because the court of appeals rejected the standard EPA used in determining that the Fayetteville discharge would be in compliance with Oklahoma water quality standards, the court did not consider whether the agency's factual findings were based on substantial evidence in the administrative record. See Pet. App. 89a.<sup>39</sup> Nor did the court remand to EPA to reconsider the propriety of issuing a permit to Fayetteville under the legal standards the court thought proper. Instead, the court undertook a totally inappropriate and unjustified inquiry into whether the record compiled at the administrative hearing supported the issuance of a permit to Fayetteville under the legal standards the court set out. This displacement of EPA's fact-finding and decisionmaking authority constituted clear error.

Firmly established principles of administrative law required the court to remand to EPA for further proceedings once it determined (again, erroneously, in our view) that the original agency decision was in error. This is fundamental: It is for the administrative agency, not the court, to evaluate different permissible courses of action andulti-

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<sup>39</sup> The court there stated:

EPA and the Arkansas parties urge that the Fayetteville discharge should be permitted because its individual impact on Illinois River water quality will not be detectable. While this may prove true (and we pass no judgment thereon), we reject the argument because of its unavoidable results.

mately to make a choice. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). This Court stated the “guiding principle” nearly forty years ago in *FPC v. Idaho Power Co.*, 344 U.S. 17, 20 (1952):

[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.

See also *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 140-146 (1940). And the Court has recently reaffirmed the principle, noting that the agency’s task on remand remains “infused with judgment and discretion, requiring the accommodation of conflicting policies that were committed to the agency’s care.” *Department of the Treasury v. FLRA*, 110 S. Ct. 1623, 1629 (1990) (internal quotation marks omitted). “It is not a task [courts] ought to undertake on the agency’s behalf in reviewing its orders.” *Id.* at 1630.

In undertaking its own inquiry into whether an NPDES permit should be issued, the court of appeals fundamentally misapplied the “substantial evidence” standard of review of agency action. The “substantial evidence” test requires only “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 522 (1981). The proper inquiry for the court is whether the *administrative agency*’s findings are supported by substantial evidence, and “[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966). Adherence to the substantial evidence test, when properly applied, “frees the reviewing courts of the time-consuming and difficult task of

weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute." *Ibid.*

The court of appeals turned this test on its head, searching the voluminous administrative record to determine whether there was "substantial evidence" to support its own, independent factual determinations. The court openly acknowledged that it was taking such an approach:

The record contains substantial evidence from which the ALJ *could have found* that the water quality of the Illinois scenic river has been degraded and that water quality standards were being violated prior to the onset of Fayetteville's discharge to the river \* \* \* .

Pet. App. 61a (emphasis added). Similarly, the court stated that its review of the record indicated that there was substantial evidence that the Illinois River had been degraded by the same types of pollutants that would be contained in Fayetteville's effluent, and that Fayetteville's effluent will be transported downstream to Oklahoma. Pet. App. 81a. With this *de novo* review of the record, the court of appeals substituted itself for the agency as the primary fact-finder in determining the scientific effects of issuing the Fayetteville permit.

Not content with displacing EPA as fact-finder, the court of appeals went further and flatly "reversed" the issuance of the Fayetteville permit without remanding to EPA. Pet. App. 95a. But the Clean Water Act, 33 U.S.C. 1341(a)(2), places the duty on the permit-issuing authority to "condition such \* \* \* permit in such manner as may be necessary to insure compliance" with water quality standards. Only if the permitting authority determines that "the imposition of conditions cannot insure such compliance" is the agency to deny the permit. Section 401(a)(2), 33 U.S.C. 1341(a)(2). EPA, the permitting agency, has never made any such deter-

mination. Prior to the court of appeals' decision, the agency had no occasion to determine the effects on Oklahoma water quality of placing further conditions in the Fayetteville permit. Accordingly, even if, contrary to our contention, the court of appeals' decision were otherwise to be upheld, the court's refusal to remand the case to the agency was inconsistent with the governing statute.

In sum, the court of appeals usurped EPA's statutorily prescribed functions. The court independently determined the legal standards applicable to the issuance of the Fayetteville NPDES permit; it determined the facts from the record *de novo*; and it issued a remedial order independent of the statutory prescription. Indeed, but for the development of the record by the administrative agency, the court's actions in this case closely mirrored the judicial role in a suit based on the federal common law of nuisance. In such cases, the federal court determines the applicable legal standards, serves as fact-finder, and develops a remedy. But, as this Court stated in *Milwaukee II*, 451 U.S. at 325, Congress vested decisionmaking authority in interstate water disputes "in administrative agencies possessing the necessary expertise" and displaced the federal common law authority formerly exercised by the federal courts. With this decision, the court of appeals came full circle, reasserting plenary authority under the guise of judicial review of agency action.

## CONCLUSION

The judgment of the court of appeals should be reversed as to the questions presented in Petition No. 90-1266.

Respectfully submitted,

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